

VIRGINIA:

FILED
CRIMINAL

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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COMMONWEALTH OF VIRGINIA)

v.)

LEE BOYD MALVO)

CRIMINAL NO. 102888

JOHN D. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

RESPONSE TO MOTION FOR DISCLOSURE OF MATERIALS
PERTAINING TO BALLISTIC TESTING AND MOTION FOR
DISCLOSURE OF SCIENTIFIC MATERIALS PERTAINING TO DNA TESTING

There is no general constitutional right to discovery in a criminal case, even where a capital offense is charged. Strickler v. Commonwealth, 241 Va. 482, 492 (1991). Rule 3A:11 of the Rules of the Supreme Court of Virginia spells out the discovery requirements in criminal cases. The Virginia Supreme Court has told us many times since the adoption of the Rules that we are a "limited pretrial discovery" jurisdiction in felony cases. See Hackman v. Commonwealth, 220 Va. 710, 713 (1980). The Commonwealth has complied with the Rules of Court in this case and the discovery order entered by this court.

By these motions, the defense seeks to avoid the discovery rules. Rule 3A:11(b)(1) required the production of written reports of scientific examinations. They have been provided. The defense now seeks the materials used in producing the reports. This request ignores the plain language of Rule 3A:11(b)(2) where the Supreme Court has said: "This subparagraph does not authorize the discovery. . . . of reports, memoranda or other internal documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (ii) of subparagraph (b)(1) of this Rule." Clause (ii) provides for the discovery of written reports only. The Virginia Supreme Court rejected virtually the same argument made here in the capital case of Spencer v. Commonwealth, 238 Va. 295, 303 (1989) when it said:

"Spencer's filed a pretrial motion seeking, *inter alia*, written scientific reports and the 'work notes or memoranda' that were the basis of the reports. The trial court granted the motion as to the reports, but ruled that the 'work notes are not discoverable.' We agree.

Spencer's discovery rights are controlled by Rule 3A:11. While that Rule permits a defendant to discover written 'scientific reports,' by its very terms the Rule 'does not authorize the discovery. . . of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case. . . ' See *Bunch v. Commonwealth*, 225 Va. 423, 436, 304 S.E. 2d 271, 278, *cert. denied*, 464 U.S. 977 (1983); *Bellfield v. Commonwealth*, 215 Va. 303, 306, 208 S.E. 2d 771, 774 (1974), *cert denied*, 420 U.S. 965 (1975)."

§9.2-121 of the Virginia Code does nothing to change the Rules of Court. It certainly does not provide for notes, memoranda and other work products of the laboratory. We ask the Court to deny both motions.

Respectfully submitted,

ROBERT F. HORAN, JR.
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response to Motion for Change of Venue was mailed, postage prepaid, to Michael Arif, Counsel for Defendant, 8001 Braddock Road, # 105, Springfield, Virginia 22151, and Craig Cooley, Counsel for the Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, Virginia 23221, this 22nd day of May, 2003.

ROBERT F. HORAN, JR.
Commonwealth's Attorney